JAN 4 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 932

DARRELL D. MACINTYRE, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DARRELL D. MACINTYRE, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on November 2, 1966.

OPINION BELOW

The memorandum opinion-and-judgment of the court below (Appendix A, *infra*, p. A1) has not yet been reported.

JURISDICTION

The memorandum opinion-and-judgment of the court below (Appendix A, *infra*, p. A1) was entered on November 2, 1966. No further or separate judgment was entered. A timely petition for rehearing in banc was denied on December 7, 1966 (Appendix B, *infra*, p. A2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an appeal from an order denying a motion to admit a lawyer defendant to probation is subject to dismissal, where it is alleged that the district judge's announced determination to apply different sentencing standards to lawyers as a class constituted such an unlawful disparity that it amounted to an abuse of discretion.

STATUTES AND RULES OF COURT INVOLVED

1. Section 1291 of Title 28, U.S. Code, as amended, provides in pertinent part as follows:

> **"§ 1291. Final decisions of district courts**
>
> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

2. Section 2106 of Title 28, U.S. Code, provides as follows:

> **"§ 2106. Determination**
>
> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

3. Rule 35 of the Federal Rules of Criminal Procedure provides as follows:

> **"Rule 35. Correction or Reduction of Sentence**
>
> "The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

4. Rule 39(a) of the Federal Rules of Criminal Procedure provides as follows:

> **"Rule 39. Supervision of Appeal**
>
> **"(a) Supervision in Appellate Court.** The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail."

STATEMENT

Petitioner, a member of the bar, was indicted on March 15, 1965, in three counts for willful understatement of income tax for the calendar years 1958, 1959, and 1960 (Pet. App. 1).[1] On April 27, 1965, petitioner pleaded not guilty to all three counts, but on February 3, 1966, he was permitted to enter a plea of nolo contendere to Count II (Pros. App. 3-4), after which, in due course, Counts I and III were dismissed. (Pet. App. 1; Pros. App. 4-5).

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[1] "Pet. App." refers to the appendix filed by petitioner in the court below, "Pros. App." to the appendix filed there by the United States Attorney.

Following a pre-sentence investigation, petitioner on March 24, 1966 was sentenced to six months' confinement and a fine of $5000 in respect of Count II (Pet. App. 1). On this occasion, the trial judge said in pertinent part (Pet. App. 5; Pros. App. 12-13):

> "You have advised the Court, Mr. MacIntyre, and the truth of the statement is accepted, that you have prepared no income tax returns for clients or for yourself, that is actual preparation, for many years. The Court is well aware that many lawyers have little more experience with tax matters than do many laymen. Even lawyers who do not engage in tax practice, however, must be held to a somewhat higher standard than laymen, if only to a standard of keen awareness that it is unlawful to conceal major amounts of income from one's business or profession."

More than a month earlier, in the case of one, Aaron Bohrod, a nationally known artist who had also been indicted for willful understatement of income, and who also pleaded nolo contendere after his petition in the nature of a motion to suppress had been denied (*Bohrod* v. *United States,* 248 F. Supp. 559 (W.D. Wis.)), the same district judge refused to sentence the defendant to confinement, saying (Pet. App. 11-12):

> "Viewed objectively the facts here compel the conclusion that your failure to report thousands upon thousands of dollars of income from the sale of paintings was willful. The pattern of your financial affairs does not reflect a distortion of values. But if there is no distortion in the direction of avarice, neither is there distortion in the direction of enunciation of these worldly goods. It is a pattern of a reasonably prudent man.
>
> "'The investment of funds in fifteen Savings & Loan Associations from Maryland to California, to cite a single example, is not the badge of economic innocence. However, it might wish to do so, this Court cannot accept on this factual record your apparent contention that the failure to report these substantial amounts of

income was wholly the product of preoccupation with your painting and a consequent impatience with record-keeping.

"In some ways, even more troublesome to the Court is your response to the discovery of this offense. You have cried out against your accusers. You have sought, it seems to me, to avoid condemnation by visiting it on them. You have played the role of one delivered over to the Philistines. But you have not shown that you are prepared to accept the consequences of your own conduct, and it is your conduct, not that of the Internal Revenue Service, which has brought you here.

"If it is the obligation of this Court to face the facts without blinking, your obligation to do so is even more stringent. I cannot say that I believe that you have yet met this test.

* * *

"I do not believe that this deterrent function justifies a prison sentence in this case. Such severity would be inappropriate to the offense. It is a serious offense, as I have said, willful, not innocent, but, nevertheless, not to be equated with a similar offense when committed by a lawyer, an accountant or an experienced businessman."

Following petitioner's sentencing, he was granted two successive 30-day stays of execution (Pet. App. 1). Thereafter, on May 13, 1966, petitioner moved the district court to reduce or change his sentence, or, in the alternative, to stay the sentence and admit him to probation (Pet. App. 2). This motion was denied on May 16, 1966 (Pet. App. 3), after which petitioner on May 23, 1966, noted an appeal both from the original sentence and from the denial of his motion to reduce (Pet. App. 3-4).

When the record reached the court of appeals, the prosecution moved (1) To dismiss the appeal from the sentence on the ground that it was untimely; (2) "To dismiss the entire appeal as frivolous, without merit, and as outside the jurisdiction of this Court"; (3) To docket and decide the

matter without hearing, pursuant to the Seventh Circuit's Rule 22 (Appendix C, *infra*, p. A3).[2]

On July 14, 1966, the court below ordered that petitioner's appeal from the district court's order of "May 16, 1966 *only*, be docketed in this Court instanter" (Appendix C, *infra*, p. A4).

The case was accordingly briefed, and it was argued on October 24, 1966. Nine days later, the court below dismissed the appeal, accompanying its denial with a brief memorandum that said among other things (*infra*, p. 1A), "We are not authorized to reduce or modify a sentence or order the trial court to do so under the circumstances of this case." The memorandum does not indicate in any respect whether dismissal was grounded on lack of jurisdiction or on an evaluation of the merits of the appeal. A timely petition for rehearing in banc was denied (*infra*, p. 2A).

REASONS FOR GRANTING THE WRIT

This case raises a vital issue concerning the jurisdiction of United States Courts of Appeals and goes to the very heart of the sentencing process in Federal criminal cases.

First. The timeworn generalization that a sentence imposed in a criminal case that is within statutory limits is not reviewable on appeal (e.g., *Gore* v. *United States*, 357 U.S. 386, 393) does not at this time correctly represent the state of the law.

1. Sentences imposed in cases of criminal contempt have for some time been regularly reviewed and reduced on appeal. *United States* v. *United Mine Workers*, 330 U.S. 258, 304; *Yates* v. *United States*, 356 U.S. 363, 367; *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380; *United States* v. *Levine*,

[2] Rule 22 of the Seventh Circuit deals with "Motions and Petitions," and paragraph (c) of that Rule provides that such matters shall normally be disposed of without oral argument.

288 F. 2d 272 (C.A. 2); *United States* v. *Harris,* C.A. 2, Docket No. 30600, decided October 25, 1966.

2. The court below a few years back, in a single case, twice reviewed the sentence imposed, and each time vacated the judgment and remanded the sentence for reconsideration. On the first occasion the court below did so because the district judge had announced that he would never admit to probation any defendant who had pleaded not guilty. *United States* v. *Wiley,* 267 F. 2d 453 (C.A. 7). On the second occasion the court below vacated the sentence because the appellant, who had a good prior record and was only an aider and abetter, had received a more severe sentence than the ringleader in the offense, who had several prior convictions. *United States* v. *Wiley,* 278 F. 2d 500 (C.A. 7). And see, for a thoughtful discussion of the two *Wiley* decisions, Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge,* 40 F.R.D. 55, 62-65.

3. Significantly, every other circuit today recognizes, in one form or another, in stronger or weaker language, that sentences which are admittedly within legal limits may none the less be reviewed on appeal for existence of unlawful disparities, use of irrelevant sentencing criteria, or, generically, for abuse of discretion. *Leach* v. *United States,* 334 F. 2d 945, 951 (D.C. Cir.); *Dodge* v. *Bennett,* 335 F. 2d 657, 659 (C.A. 1); *United States* v. *Piccioli,* 352 F. 2d 856, 860 (C.A. 2); *United States* v. *Frank,* 245 F. 2d 284, 288 (C.A. 3); *United States* v. *Martell,* 335 F. 2d 764, 766 (C.A. 4); *Heidrich* v. *United States,* C.A. 5, No. 23,081, decided Nov. 14, 1966; *United States* v. *West Coast News Company,* 357 F. 2d 855, 865 (C.A. 6); *Young* v. *Garrett,* 159 F. 2d 634, 635 (C.A. 8); *O'Neal* v. *United States,* 332 F. 2d 152 (C.A. 9); *Hedrick* v. *United States,* 357 F. 2d 121, 124 (C.A. 10).

4. In a very recent case, *United States* v. *Overton,* 359 F. 2d 28, the Fourth Circuit weighed every discretionary element involved in the sentence there considered, saying (p. 29) of the contentions made by the appellant, "While

this argument actually calls for a review of the sentence, we undertake it rather than to maintain a policy at the risk of inflicting an injustice."

In the light of those authorities, there was surely substance in petitioner's contention that in setting apart lawyers as a class for heavier sentences, the trial judge here was quite as arbitrary as the one in *United States* v. *Wiley*, 267 F. 2d 453, also decided by the court below, who refused to consider for probation any defendant who had put the prosecution to its proof by standing trial.

Second. Although petitioner's appeal may well have risked affirmance, it was not subject to dismissal. Simple affirmance is a risk taken by any appellant, as the statistics kept by the Administrative Office of United States Courts over the years show; the percentage of affirmances in United States Courts of Appeals ranges pretty consistently between 75 and 66 per cent of all appeals taken.

1. By the preponderance of current authority, the denial of a motion under Criminal Rule 35 for reduction of sentence is appealable. *United States* v. *Caughorn*, 299 F. 2d 563 (C.A. 6); *Jacobsen* v. *United States*, 260 F. 2d 122 (C.A. 8); *Heidrich* v. *United States*, C.A. 5, No. 23,081, decided Nov. 14, 1966; *United States* v. *Edlin*, C.A. 4, No. 11,061, decided Dec. 9, 1966; *Klink* v. *United States*, 308 F. 2d 775, 776 (C.A. 10) (*semble*). To the extent that the court below held the contrary in *Bryson* v. *United States*, 265 F. 2d 9, 14, certiorari denied, 360 U.S. 919, it plainly departed from that view, not only in the two later *Wiley* cases (267 F. 2d 453; 278 F. 2d 500), but preeminently in the present case, when it denied the prosecution's motion to dismiss petitioner's appeal. *Infra*, p. A3. Indeed, perhaps the strangest aspect of this case is that although that motion to dismiss was originally denied, and the prosecution in its brief on the merits prayed for affirmance, the court below after argument dismissed petitioner's appeal and adhered to such dismissal notwithstanding his petition for rehearing.

2. The court below in its order of dismissal did not use the word "frivolous," and we submit that it could not properly have done so. Because in this so fluid field of law, where the winds of change are eroding much of what a generation ago was deemed firmly settled, petitioner's contentions had substance. This is plainly seen from the authorities cited above under *First*.

Third. We suggest that there was in any event no authority for dismissal, once it had become the law of the court below that an order denying a Rule 35 motion was appealable, law that was reiterated by rejection of the motion to dismiss the appeal in this case (*infra*, p. A3). Significantly, the ultimate dismissal of petitioner's appeal was rested neither on non-appealability nor on the stigmatic characterization, "frivolous."

1. The authority generally relied on for dismissals of appeals is *United States* v. *Johnson*, 327 U.S. 106. But that case was decided before the Federal Rules of Criminal Procedure went into effect, and moreover all but one of the decisions there relied on (327 U.S. at 113, note 6) were plainly inapposite; except for *Alberts* v. *United States*, 21 F. 2d 968 (C.A. 6), a case involving long and obviously avoidable delays, the decisions cited dealt either with this Court's lack of jurisdiction to entertain appeals from State courts that involved insubstantial Federal questions, or to entertain direct appeals from Federal district courts under old § 238 of the Judicial Code that involved insubstantial constitutional questions. Significantly, the Federal Rules of Criminal Procedure nowhere authorize dismissing appeals that are within the statutory jurisdiction of Courts of Appeals.

2. Dismissal rather than affirmance of an appeal results in no saving of judicial time; to the contrary. The present case was duly argued, like any other appeal—and prior to such argument the court below was required to pause for consideration of the prosecution's motion to dismiss.

Similarly, in *United States* v. *Edlin*, C.A. 4, No. 11,061, decided Dec. 9, 1966, which was also an appeal from the denial of a Rule 35 motion, the prosecution moved to dismiss the appeal prior to argument. But the case was argued, and, following argument, the ruling below was affirmed; the appeal was not dismissed. Again, two matters rather than one came before the court.

3. The line between an affirmance and a dismissal on non-jurisdictional grounds is both dim and fuzzy, as a few examples over the last few years will readily demonstrate. In *Bandy* v. *United States*, 278 F. 2d 214 (C.A. 8), after an appeal was dismissed as frivolous, this Court granted certiorari and reversed (364 U.S. 477); thereafter, following a hearing on the merits, the judgment was affirmed. *Bandy* v. *United States*, 296 F. 2d 882 (C.A. 8). In *White* v. *United States*, 307 F. 2d 740 (C.A. 8), it was held that dismissal of an appeal for frivolousness was not subject to reconsideration. In *Rumph* v. *United States*, 343 F. 2d 580 (C.A. 5), the court accepted the conclusion of appointed counsel that the appeal was frivolous and permitted him to withdraw (cf. *United States* v. *Camodeo*, 367 F. 2d 146 (C.A. 2), *accord*); while in *Johnson* v. *United States*, 360 F. 2d 844 (D.C. Cir.), another circuit held that such a conclusion could not be accepted, nor a motion to withdraw granted, in the absence of a fully documented memorandum. Finally, in *Brown* v. *United States*, 293 F. 2d 149 (D.C. Cir.), where the court dismissed an appeal, the dissenting judge voted to affirm rather than to dismiss.

We submit that the attempted distinction between affirmance and dismissal, which indeed recalls the Japanese radio propagandist of World War II and his nightly announcements of x American vessels sunk "of which y were instantly sunk," has no place in appeals from district courts to courts of appeals. Dismissals in such instances are appropriate only when a particular order sought to be reviewed is not appealable as a matter of law, or when the

appeal is out of time, or when the appellant has grossly violated the rules of the appellate court. But there is no authority in any statute or in any rule of court for dismissing an appeal by way of passing emphatic judgment on its merits.

The practice of dismissing appeals that comply with every jurisdictional requisite and then are prosecuted in strict conformity with rules of court, simply because the merits of such appeals do not commend themselves to a majority of the sitting judges in a court of appeals, should, we submit, be condemned—and then abandoned. This case, where in view of the increasing fluidity of the applicable law the contentions made cannot fairly be characterized as frivolous in any degree, furnishes an appropriate vehicle for doing so.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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